APPENDIX D

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,428

GEORGE A. LANDELL, Executor *et al*, *Petitioners*,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

Appeal From Summary Judgment of the United States District Court for the District of Columbia

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PETITION FOR REHEARING BEFORE THE FULL COURT, OR IN THE ALTERNATIVE, FOR MODIFICATION OF OPINION

Petitioners respectfully request the Court for a rehearing of the instant case before the full Court, sitting *en banc*, or, in the alternative, for modification of the *Per Curiam* opinion herein, dated April 14, 1955 and, as grounds therefor, state as follows:

I.

The District Court, whose decision was affirmed by this Court, failed to accept the allegations in the complaint and relied upon papers not in evidence and not properly considered upon motion for summary judgment. That Court, therefore, erroneously concluded that the complaint was founded upon an ancient and concealed private, commercial, fraud fully consummated in 1896.

II.

We believe that this Court, unaware that the District Court had failed to accept the fundamental allegations of the complaint as it was required to do, has misinterpreted the cause of action stated in the complaint. The gravamen of the complaint is not "that a reorganization of the railroad in 1896 was illegal". It is (a) that petitioners derive their rights from an existing statutory contract now being violated, to which the federal government, the captive Northern Pacific Railroad Company, and petitioners, are parties; (b) that respondent, through fraud upon the court and systematic abuse of the judicial process, has usurped and misappropriated petitioner's 3% statutory share of the continuing franchises and assets provided in such statutory contract; and (c) that the government and respondent, through the use as final and conclusive upon petitioners of certain consent decrees procured by fraud upon a court and of adjudications of courts and opinions of Attorneys General upon collateral matters, have effectively prevented, until now, the presentation of petitioners' case to the courts.

III.

We respectfully insist that the proper administration of justice requires that this Court consider and deal in its opinion with the serious charges of respondent's fraud upon the court and systematic, continuing misuse of the judicial process to accomplish and maintain its illegal seizure of the 43,000,000 acre land grant, 2500 mile right of way, and railroad franchises vested by Congress in Northern Pacific Railroad Company, the federal corporation, in which petitioners are stockholders.

IV.

The District Court's opinion ignores the reservation of decision in United States v. Northern Pacific Railway Co. (311 U.S. 317, 342, 61 S. Ct. 264, 276) as to the validity of respondent's succession to the federal corporation.

DISCUSSION OF GROUNDS FOR PETITION

I.

The District Court's Failure to Accept the Allegations of the Complaint and Its Reliance Upon Papers Not in Evidence.

Judge Tamm's opinion relies upon and refers to Exhibits of respondent which were nothing more than exhibits for identification on the deposition of one of the petitioners. (See 122 F. Supp. at pp. 254, 255, 257, 258, 259). These are papers selected for printing by respondent's counsel and marked as "Defendant's Exhibit No. ... for identification" (Transcript pp. 430, 638, 417, 447, 588). None has been placed in evidence or tested by the rules of evidence. These selected papers marked for identification are relied upon by the District Court to reject the allegations in the complaint. We submit that they merely reflect the views of respondent's counsel of what material might best be used to divert attention from the real cause of action set forth in the complaint. Such views are irrelevant and immaterial to this case. They are, by no conceivable construction, admissible as a basis for Summary Judgment under Rule 56 of the Rules of Civil Procedure.

Petitioners did not, unfortunately, discuss this point in briefs or oral argument before this Court. Petitioners, however, moved this Court under date of October 27, 1954 to exclude from printing in the appendix more than 500 pages of transcript designated by the appellee, respondent Rail*way* herein. Among these 500 pages were the exhibits for identification relied upon by the District Court as a basis for its opinion. The motion to exclude was denied November 19, 1954 after oral hearing before a panel of three judges of this Court.

The basic reasons for exclusion advanced in the motion were that:

> (a) To include same in the record would "unnecessarily burden the Court and hinder its consideration of this case" and

(b) "Included in the transcript record are *2,971 pages, all marked as defendant's exhibits for identification* on the Lishman deposition. More than 2,500 of such pages are copies of printed briefs, records and opinions in other cases handled by attorneys who had been dismissed as counsel for plaintiff committee long prior to the filing of the present complaint."

"The appellants, in one of the affidavits submitted to the District Court (Tr. 831-832), requested the Court to exclude from the record 1,705 pages of such material. It was shown to the District Court that such 1,705 printed pages marked by defendant for identification had not been vouched for as correct, accurate or complete or shown to be relevant or competent and to admit them would 'unnecessarily burden the record with excessive material'. This objection was repeated in plaintiffs' points and authorities (Tr. 992). The District Court did not rule on this objection."

Petitioner's motion also informed this Court:

"The basic purpose of the additional 500 transcript pages designated by appellee is to support its claim that appellants' rights under a federal statute (the Act of July 2, 1864) have been extinguished by the passage of time, coupled with alleged knowledge on the part of appellants of the essential facts. By this approach, appellee would in effect have the court vary the express terms of the federal statute giving appellants, as stockholders in the federal corporation, rights in perpetuity. *Since the material in question is not properly before the Court on motion for summary judgment, it is not proper that it be printed in the Joint Appendix, thus adding unnecessary confusion and difficulty to the disposition of this case.*" (Emphasis supplied. See, Appellants' App. 193-194).

This Court in its order denying respondent's motion, indicated that each party might file a separate printed appendix. The Court did not, however, rule on the admissibility of any of defendant's exhibits marked for identification.

It is contrary to due process of law for the District Court to use as evidence against petitioners, material selected and caused to be marked for identification by respondent's counsel, never tested in any way under the rules of law and evidence, and inadmissible on a motion for summary judgment under Rule 56.

By devoting its briefs and arguments before this Court and the District Court *not to the allegations in the complaint*, but to the 2,971 pages of "exhibits" it had caused to be marked for identification upon the taking of the deposition, respondent has succeeded in smothering the factual allegations that it is breaching a federal statutory contract and is guilty of misusing the judicial process, all to the injury of petitioners. It advised Judge Tamm that it was "not in order" for him to consider such allegations. (Main brief, pp. 36, 17). Judge Tamm's opinion shows that he followed this advice.

The District Court in its opinion uses "Defendants Exhibit No. 100 for identification" to describe petitioners' cause of action as one of a skillfully concealed fraud (122 F. Supp. at p. 259). There is no allegation of concealed fraud in the complaint. That is not the basis or theory of this case as the discussion under Point II hereof shows. (See also Lishman deposition, Tr. 563, 578, where it is testified that the complaint is *not* based upon any fraud, *except the fraud upon the court*). The District Court's use of a 1916 lawyer's letter marked for identification as a basis for characterizing the cause of action rather than going to the complaint itself is utterly unfounded.[1]

Respondent in its brief and argument has cited no law and no case giving it authority to operate Northern Pacific's

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[1] The serious errors of fact in Judge Tamm's opinion have already been called to this Court's attention (Reply brief pp. 5, 9). This Court's attention was also called to the affirmative misrepresentation of fact in respondent's brief herein (See Petitioner's reply brief pp. 2-4 and Tr. 458, Appellants' App. 8). The fact that the *Hoover* case opinion, relied upon by Judge Tamm and by this Court, was obtained by suppression of records by both parties has also been pointed out (Main brief pp. 16, 38, reply brief pp. 5, 10, Tr. 146, 910).

main transcontinental line of railroad. Judge Tamm's opinion makes no mention of the lack of such authority and contains no discussion of the statutory contract (See Point II below).[2]

II.

The Cause of Action as Stated in the Complaint.

(a) *The statutory contract.*

It is settled law that railroad land grants result in contracts and that the Act of July 2, 1864 is such a contract and is binding upon respondent herein. *Northern Pacific Railway Co.* v. *U. S.*, 320 U.S. 248, 67 S. Ct. 747, 752; *Burke* v. *Southern Pacific R. Co.*, 234 U.S. 669, 680, 34 S. Ct. 907, 911.

The complaint pleads the statutory contract upon which petitioners rely, viz, the Act of July 2, 1864. It is pleaded in the complaint that the Northern Pacific Rail*road* Company duly filed its written acceptance with the President of the United States of the covenants provided in such Act and that petitioners duly accepted the offer contained in the statute by subscribing to the stock of Rail*road*. (Appellants App. 12-14).

Respondent as 97% stockholder in the federal corporation (which is party to this statutory contract), claims all the benefits of such contract, while denying any of such benefits to petitioners, who are holders of 3% of the stock in that corporation. Yet both the 97% and the 3% interests derive from a common source—the Act of July 2, 1864.

It is pleaded that respondent has and is *today* violating the terms of the statutory contract and has facilitated its violations by fraud on the Court and continuing misuse of the judicial process. The underlying facts to support these allegations are pleaded in detail.

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[2] We emphasize herein the contractual nature of the statutory authorization for the Northern Pacific Rail*road* Company since that aspect of such authorization was, apparently, not sufficiently covered in our briefs.

It is further alleged in the complaint that this statutory contract by its own terms is non-assignable.[3]

The statutory contract provides, as pleaded, that it may be altered, amended, or repealed by only one of the parties thereto—Congress. The complaint alleges that respondent, in 1896, prior to the foreclosure sale of that year, applied to Congress for an amendment of the Act of July 2, 1864, to permit respondent, as 97% stockholder, to be substituted for Northern Pacific Rail*road* Company, the federal corporation. Congress expressly refused such substitution and has never authorized it. In *Humbird* v. *Avery*, 195 U.S. 480, 25 S. Ct. 123, the Court pointed out that *Congress had passed legislation expressly refusing to recognize* Rail*way* as successor to Rail*road*. (25 S. Ct. at 126, 132).

Recognizing that the real party in interest is the federal corporation, respondent keeps alive such corporation and its 97% stock interest therein. All its mortgages contain the extraordinary provision that it may, at any time, reconvey the mortgaged property back to the federal corporation without the consent of the mortgage trustee. It is so pleaded in the complaint.

We have considered at length in our briefs the proposition that laches cannot invalidate rights based upon a statutory contract. We refer the Court especially to *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 114, 73 S. Ct. 1007, 1014, where the Supreme Court stated: "The failure of the executive branch to enforce a law does not result in its modification or repeal—the repeal of laws is as much a legislative function as their enactment." See also, *Oregon & California R. Co.* v. *U. S.*, 238 U.S. 393, 35 S. Ct. 908, 922, 925.

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[3] Authorities establishing the non-assignability of the contract and of railroad franchises are cited in our main brief pp. 22, 25, 28-30. Acceptance of the pleading (Appellants' App. 33, Tr. 157) that the statutory contract is non-assignable would have eliminated the present costly appeal and the printing of hundreds of pages of material never admitted in evidence or ruled upon.

(b) *Fraud upon the Court.*

After Congress had refused to amend the statutory contract, and while it held 97% of Rail*road*'s stock, respondent, in circumvention of the law and by fraud upon the Wisconsin federal court (Appellant's App. pp. 35, 60, 72, main brief pp. 34-38), procured a consent foreclosure decree in its favor against Rail*road* in proceedings to which neither the United States nor petitioners were parties. Also by fraud upon the court respondent procured a consent, sequestration deficiency judgment against the federal corporation. It has used and is using these decrees to prevent the 3% minority from vindicating their statutory contract interest (Appellants' App. 72, 69, 8, 27, 33, 37-39, 42). In the present case, notwithstanding the determination in *Northern Pacific Railway Co.* v. *Boyd,* 228 U.S. 482, 33 S. Ct. 554, that these decrees are void as to non-parties, respondent imposes them upon this Court as *res adjudicata* against the petitioners. (Answer, Appellants' App. 106, 107, 119).

No court or public official has ever adjudicated petitioner's claims. Rulings by attorneys general that these claims must not be heard because they were attempts at collateral attack upon decrees which were final and conclusive, are obviously not rulings that the claims have no substance or merit.

(c) *Respondent's Systematic, Past and Present Misuse of the Judicial Process.*

Respondent has persuaded public officials that the consent decrees it procured by fraud upon the Wisconsin federal court are conclusive adjudications that it has succeeded to Rail*road's* franchises, land grant and other assets. The Attorney General has accepted these decrees as not subject to collateral attack. In government suits against Rail*way* and Rail*road* the Attorney General has alleged in bills of complaint that by these decrees Rail*way* has lawfully succeeded to Rail*road,* the federal corporation. In these suits Rail*way* has filed answers, and has caused its captive

Rail*road* to file answers *admitting* the truth of the allegations in the government's complaint that Rail*way* lawfully succeeded to Rail*road* under and by virtue of said decrees.[4] (122 F. Supp. at p. 257, Appellants' App. 189).

The Supreme Court was unaware that the pleadings before it were erroneous. Respondent thus secured the advantage of having that Court treat as conclusive, decrees which were void, having been obtained by a fraud upon a Court. In certain cases the Court has referred to Rail*way* as the "successor" to Rail*road*.

Rail*way*, respondent herein, unconscionably, and to the past and present prejudice of petitioners, used and uses the Supreme Court statements thus obtained, as conclusive adjudications against petitioners. Respondent pleads these statements as *res adjudicata* upon the question of its succession to Rail*road*. *Respondent has made this misleading use of Supreme Court statements before this Court and even before the Supreme Court itself.* (Reply brief p. 8, Appellants' App. 189).[5]

It is pertinent to emphasize to this Court that the District Court was persuaded to use against the petitioners certain opinions of Attorneys General which had been overruled in *Northern Pacific Railway Company* v. *Boyd*, 228 U.S. 482, 33 S. Ct. 554. As we have stated, that case held that the decrees relied upon as conclusive by the Attorney General and by respondent were void as to non-parties. (Tr. 196)

Respondent's improper use of court cases and opinions of Attorneys General as conclusive adjudications, taken together with the part played by the government, has

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[4] Rail*way* also currently causes Rail*road* to execute deeds and other papers attesting that Rail*way* is its lawful successor and thus continues its uninterrupted misappropriation of Rail*road*'s assets. (Appellants' App. 34).

[5] Petitioners' Points and Authorities quoted extensively some of these pleadings as taken from the records filed in the Supreme Court, Tr. 998-1000, See, also Tr. 174, 189, 1112. Respondent's reply brief in the District Court refused to discuss, these facts of record alleged in the complaint. Respondent's reply brief persuaded the District Court that "discussion of . . . those questions is not in order." (Tr. 1053).

effectively deterred, until now, the prosecution of petitioners' claims. This systematic misuse of the judicial process and its deterrent affect upon the institution of litigation, is pleaded in the complaint and must be accepted as true upon a motion for summary judgment. (Appellants' App. pp. 72, 69).

It was manifest error for the District Court to refuse to accept these important facts pleaded in the complaint and to rule that these basic allegations were only "plausible argument". (122 F. Supp. at 255)

III.

We Respectfully Insist That the Proper Administration of Justice Requires That This Court Consider and Deal in Its Opinion With the Serious Charges of Fraud Upon the Court and Misuse of the Judicial Process, to Petitioners' Detriment, Which Are Made in the Complaint Herein and Supported by Affidavit and by Facts of Record Before the Supreme Court.

The authorities collected in our main brief pp. 34-37 show, we submit, that this Court is under a duty to inquire into the allegations in the complaint and petitioners' affidavit filed herein that respondent has been guilty of a fraud upon the court and misuse of the judicial process to the injury of the petitioners. These are not idle charges. They are based upon allegations in the complaint and facts of record in this case and facts of record in Supreme Court cases, detailed references to which are contained in our briefs. We believe that unless this Court makes due inquiry herein, the true administration of justice will be impaired. The violator of a statutory contract will be permitted to deprive citizens of property vested in them by the clear provisions of an existing statutory contract and to unjustly enrich itself thereby. Under the Constitution, Congress itself could not confiscate these statutory property interests except for a public purpose and upon payment of just compensation.

IV.

The District Court's Opinion Ignores the Reservation of Decision in United States v. Northern Pacific Railway Co. (311 U.S. 317, 342, 61 S. Ct. 264, 276) as to the Validity of Respondent's Succession to the Federal Corporation

In *Northern Pacific Railway Co.* v. *United States,* the Supreme Court made an extraordinary reservation in its decision—a reservation as to the validity, among other things, of the legality of Rail*way's* right to succeed to Rail*road's* interest. (Appellants' App., 192, 193, See Tr. 994). This the Court did despite the fact that, in his oral argument in the Supreme Court in that case, the attorney for the United States stated that the United States did not question the right of the Northern Pacific Rail*way* Company to act as the lawful successor of the Northern Pacific Rail*road* Company, although the question had not been presented to the Court below for decision and no testimony was ever taken before the master or before the Court in support of Rail*way's* claim to be such successor. Judge Tamm's "particular attention" was called to this reservation. (Tr. 194, 123).

If the instant case should be remanded for trial (which we regard as unnecessary) we propose to ask respondent's counsel for an admission, under Rule 36 of the Rules of Civil Procedure, that counsel for Rail*way* in his oral argument before the Supreme Court in *Northern Pacific Railway Company* v. *United States,* 311 U.S. 317, stated that the Reorganization Managers of Northern Pacific Rail*road* Company had acquired the bonds and all the stock of Rail*road* and that thereupon in consummation of the 1896 plan of reorganization, the bonds, and all of the stock of Rail*road,* had been exchanged for bonds and stocks of Northern Pacific Rail*way* Company. In fact, of course, petitioners' 3% interest had not been acquired.

We suggest that, had the Supreme Court known that unacquired shares of a dissident minority were outstanding, it would have had even graver doubts of the validity of

Railway's title than those which presumably caused the reservation of its decision on that point. Among the nine Justices now composing the Supreme Court, four were sitting at the time of the aforesaid oral argument.

CONCLUSION

In 1947, as we have shown under Point II hereof, the Supreme Court held that respondent, Railway, is still bound by the statutory covenants in the Act of July 2, 1865, so far as the government is concerned. Yet this Court now rules that covenants in the same statutory contract are not binding upon the respondent, so far as the petitioners are concerned.

This, we submit, is not equal justice under law. If the respondent's claim is correct, which we deny (See, Point V of our main brief), that to grant relief to petitioners may injure innocent third persons, then respondent should appeal to Congress, the contract and statutory source for relief, and not to the courts. Congress is the party to the contract which has the sole power to amend. Certainly this Court, under the guise of laches invoked by a wrongdoer should not undertake to amend or to annul the statutory covenants between Congress and these petitioners. Whether these covenants are wise or have outlived their usefulness, is not a matter for the judgment of this Court.

Congress covenanted that the petitioners would have a continuing 3% interest in the non-assignable railroad operating franchise and right of way through 2500 miles of the federal public domain.

Congress did not provide that the benefits of the franchises, right of way, land grant and covenants would run to only 97% of the people of the United States who accepted the statutory offer.

Congress did not provide that the benefits and the covenants would be permanent so far as the government is concerned, but only temporary, so far as the 3% minority are concerned.

Congress, when asked by respondent to amend the contract in the foregoing respects, refused to do so. Congress has refused respondent's requests to be substituted for the federal corporation. (Appellants' App. 33).

Under any rule of law, this Court should not undertake to sanction respondent's attempt to vary, through the use of material not in evidence, the clear terms of the statutory contract.

The foregoing basic matters, pleaded with factual detail in the complaint, and briefed with thoroughness, made no impression upon the District Court. Its opinion discusses, with no reference to the statute, a cause of action not presented in the complaint.

In the light of these facts we submit that this Court should reverse its affirmance and adoption of the District Court's opinion and recognize, at the least, that the view of the nature of petitioners' cause of action taken by Judge McLaughlin, who accepted the allegations of the complaint, is the true law of this case.

WHEREFORE, it is respectfully prayed that this Honorable Court set this case down for rehearing before the full Court sitting *en banc*, or, in the alternative, that it set aside the summary judgment in favor of the respondent and award judgment to petitioners, or enter such other and different decree herein as to this Court seems necessary and appropriate.

Respectfully submitted,

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EDWARD BROWN WILLIAMS

Certificate of Good Faith

I, Robert W. Lishman, counsel for petitioners in the above-entitled case, hereby certify that this foregoing petition is presented in good faith and not for delay.

ROBERT W. LISHMAN.

April 28, 1955.

Certificate of Service

It is hereby certified that three copies each of the Petition for Rehearing were forwarded by first class mail, postage prepaid, to Bernard G. Ostmann, Esquire, Transportation Building, Washington 6, D. C., attorney for respondent, this twenty-eighth day of April, 1955.

ROBERT W. LISHMAN,
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FILED
SEP 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 299

GEORGE A. LANDELL, *et al.*,
Petitioners,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented.

Petitioners, minority stockholders of Northern Pacific Rail*road* Company, commenced this action in 1950, attacking as illegal mortgages placed on the Rail*road's* properties between 1879 and 1889 and a reorganization and foreclosure of those mortgages carried out under court decrees between 1896 and 1899, pursuant to which the Rail*road's* properties were transferred to Northern Pacific Rail*way* Company. On motion for summary judgment below, it was established by undisputed documentary evidence coming largely from

petitioners' own files: (a) that petitioners or their predecessors had declined an offer to participate in the reorganization upon the same terms as all other stockholders, (b) that petitioners or their predecessors had knowledge or notice, for at least 50 years before this action was brought, of the facts and legal theories upon which their present claims are based, and had repeatedly and ineffectually pressed their "public interest" arguments upon the Executive and the Congress, (c) that similar prior litigation begun in 1900 was dismissed for lack of prosecution in 1939, (d) that every participant in the transaction has long since died and (e) that the position of respondent, its creditors and its stockholders and the properties of respondent have changed almost beyond recognition in the intervening half century.

In the opinion of respondent the sole question is whether under these circumstances petitioners are barred by (1) laches or (2) the statute of limitations.

Both courts below held—we submit correctly—that the action should be dismissed for laches, and found it unnecessary to consider the question of limitations.

Statement.

The substance of the complaint (App. 2-77*) is that mortgages placed on the Northern Pacific Railroad's property between 1879 and 1889 and aggregating more than $100,000,000 were illegal and void, and that the 1896 reorganization and foreclosure of those mortgages under which the Railroad's properties passed into the ownership and

* Petitioners' appendix in the Court of Appeals is numbered from page 1 to 270. Respondent's appendix in that Court is numbered consecutively, starting at page 271. Citations to both appendices will be in the form of App. ..... herein.

possession of the Railway, were likewise illegal and void. The prayer is for a declaration of nullity, a restoration of the properties, and an accounting.

Defendant Railway first moved to dismiss the complaint on the grounds of (i) absence of a necessary party (the old Railroad), (ii) improper venue and (iii) invalidity of service of process in the District of Columbia. When this motion was denied by Judge McLaughlin (98 F. Supp. 479; App. A to petition, p. 1a) the Railway answered the complaint and took the deposition of the principal plaintiff Robert W. Lishman, who is also of counsel for petitioners. In connection with his deposition there were marked as exhibits a number of documents coming chiefly from petitioners' files. On the basis of that deposition, those documents and three affidavits establishing (a) the death of all concerned in the original transactions and (b) the substantial changes which have occurred in the Railway's position and properties since 1896, the Railway moved for summary judgment under Rule 56 on the ground of (1) statute of limitations and (2) laches.

The District Court in a careful opinion (122 F. Supp. 253, App. A to Petition, pp. 8a, 17a) held:

> "Granting the relief prayed for by the plaintiffs would create a concentric chaos affecting the rights and equities of thousands of stockholders and creditors, most of whom were not even in existence at the time of the alleged fraud. • • •
>
> This Court must find that the alleged rights of the minority stockholders are buried in the grave created by their inexcusable lack of diligence in not sooner asserting these claims in the courts."

The District Court accordingly dismissed the complaint for laches and found it unnecessary to pass upon the ques-

tion of limitations. The Court of Appeals affirmed per curiam (223 F. 2d 316, App. A to Petition, p. 18a) on the basis of the District Court's opinion.

Background of the Litigation.

The Northern Pacific Rail*road* Company was chartered by the Act of July 2, 1864 (13 Stat. 365, App. 198). Its early history is summarized by Mr. Justice Roberts in *United States* v. *Northern Pacific Railway Co.*, 311 U. S. 317, 324-328 (1940). The original Act permitted only public subscriptions to stock and prohibited the issue of mortgage bonds without the consent of Congress. When it became apparent that sufficient funds could not be raised in that way, Congress duly gave its consent to the issuance of bonds and the right to "secure the same by mortgage on its [the Railroad's] property and rights of property of all kinds and descriptions * * * including its franchise as a corporation." * A bond issue of $30,000,000 was floated in 1870. During the panic of 1873 the Railroad became insolvent; and by a reorganization in 1875 this bond issue was paid off in preferred stock (App. 16-17). With the help of subsequent mortgage bond issues (i.e. those now attacked as void) the Railroad was finally completed in the 1880's.

A short period of relative prosperity followed; but in the panic of 1893 the Railroad was again unable to meet payments on some of its bond issues. A decision of four Supreme Court Justices (*Farmers' Loan & Trust Co.* v. *Northern Pacific R.R.*, 72 Fed. 26 (1896)) resolved conflicting applications for receivership and fixed primary jurisdiction in the Circuit Court for the Eastern District

* Joint Resolutions of March 1, 1869, and May 31, 1870, 15 Stat. 346 and 16 Stat. 378; see App. 212-214.

of Wisconsin. Pursuant to foreclosure proceedings which followed in that Court, the present Northern Pacific Rail*way* Company "acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." (*U. S.* v. *Northern Pacific Railway Co.*, 311 U. S. at 328).

During the receivership protracted negotiations were carried on by representatives of the stockholders and bondholders to develop some plan of reorganization which would scale down fixed charges to accord with income and at the same time preserve so far as possible their relative rights. Such a plan was finally agreed on and publicly presented to all the Railroad's security holders in March 1896 (App. 7-8, 23, 385; Def. Ex. 4, App. 295, 408). It provided for the acquisition by J. P. Morgan & Co., as reorganization managers, of substantially all the outstanding stock and bonds of the Rail*road* in exchange for securities of the successor corporation—Northern Pacific Rail*way* Company—and the use of the old securities as the medium of payment for the purchase at judicial sale of all the properties (whether or not covered by mortgage) of the Rail*road*.

So far as the stockholders were concerned, the conditions of participation, which were open to all (App. 7; Def. Ex. 4, App. 295, 408), provided for the exchange share for share of old Rail*road* stock for new Rail*way* stock upon payment of $10 for each share of preferred and $15 for each share of common. Substantially all the bondholders, and over 95% of the stockholders, joined in the plan. The predecessors of the petitioners were among the small minority of stockholders who refused to participate.

By foreclosure decree dated April 27, 1896, and judicial sales and supplemental decrees in July, August and September of the same year, the Railway acquired, as contem-

plated by the Reorganization Plan, all the mortgaged properties of the Railroad, constituting the substantial bulk of its assets. By sequestration decree in 1899 the Railway similarly acquired the remaining unmortgaged properties. Since then the old Railroad has been an empty corporate shell, and all its former properties have been openly owned and operated by the Railway.

The Petitioners, their Predecessors and their Counsel.

From the first the proposed Reorganization Plan was opposed by a small but vocal minority of shareholders, located mainly in the Philadelphia area. Printed and apparently widely distributed correspondence between the Philadelphia law firm of Biddle & Ward (representing Railroad shareholders sent to them by the Philadelphia brokerage firm of Brice Monges & Co.) and Brayton Ives, president of the Rail*road*, heralded the formation of the petitioners' Committee of minority shares even prior to the foreclosure decree of April 27, 1896 (Def. Exs. 4-6, App. 295-7, 408-17). The final letter in this exchange of correspondence (April 15, 1896), after expressing dissatisfaction with Mr. Ives' position, states (App. 417):

> "We feel that under existing circumstances the stockholders of the Company will have to co-operate for the protection of their own rights without relying upon the Company."

In November 1898 a self-perpetuating stockholders' protective committee was created under an agreement which specifically contemplated litigation (Def. Ex. 1, App. 292, 403-4). Under this agreement some 30,000 shares, mainly common, were deposited. The present petitioner committee is acting under a redraft of the 1898 agreement

executed in 1906, which likewise specifically contemplated litigation (App. 288).

Mr. Charles Fearon of Philadelphia, by far the most active and influential member of the Committee, served from 1898 until his death in 1943. Two of the present members of the Committee, Messrs. Freeman and Welsh, are connected with the minority shares primarily by their friendship with Mr. Fearon (App. 380). The third, Robert W. Lishman, is the husband of Mr. Fearon's niece (App. 290), and is of counsel for petitioners as well as a party to this action in the dual capacity of a member of the Committee and trustee of his wife's holdings. The final petitioner George A. Landell, as executor for E. A. Landell, has been a "family friend for many years" (App. 291).

The Committee was represented during the years of its early activity by John G. Johnson, one of the outstanding members of the Philadelphia bar, who served until forced to withdraw because of a conflict of interests (App. 311, 340), and by Joseph C. McCullen, who represented the Committee as late as 1925, except for his period of service on the Bench in Philadelphia (App. 301, 498). Mr. McCullen, characterized on deposition by Mr. Lishman "as about as diligent a counsel as one could hope to have" (App. 304), was followed during the 1920s and 1930s by Thomas Boylan, formerly Mr. McCullen's law clerk (App. 345).

This Committee, its counsel and associated holders of minority shares have engaged in varying degrees of activity throughout the period following the 1896 reorganization. During the decade preceding this suit the Committee appeared to be more or less moribund; and for over 30 years it has sent no circulars of advice to the minority shareholders whom it claims to represent (App. 329).

Petitioners base their attempt to overturn the 1896 reorganization on two major points. They assert (a) that the 1896 transfer to the Railway was invalid because the mortgages foreclosed were illegal and "void" since Congress had not consented to them and (b) that the foreclosure proceedings themselves were void because procured by a "fraud upon the court" consisting of (i) misrepresentations as to the compliance of the Railway with the laws of the States through which the Federal right-of-way passed and (ii) misrepresentations as to the "independent" status of the Railway as a purchaser at the 1896 foreclosure sales.

Each of these points is presented now, as it was presented below, on the theory that it constitutes both a reason why petitioners should succeed on the merits and a reason why the action should not be dismissed for laches. We are concerned with them at this time only from the latter viewpoint, and shall consider them only to the extent necessary to show that they are identical with the claims which petitioners or their predecessors have been raising in various quarters, with uniform lack of success, for almost 60 years.

Activities in Behalf of the Dissenting Shares: 1896-1906.

During this decade petitioners or their counsel came into possession of every fact upon which they now rely and developed all of the claims and legal theories which they now advance.

Throughout this period they were active in many quarters, pressing their claims at meetings of the shareholders of the Northern Pacific Rail*road*, raising objections to officers of the Rail*way*, the executive departments and the Congress, examining the records of the reorganization and —in one instance—instituting legal proceedings which were

quickly allowed to lapse into inactivity. The antiquity of their present claims can thus be easily traced.

For example, pages 6-8 and 18-21 of the present petition assert that Congress in 1870 gave consent to only a single mortgage, that the mortgage powers of the Railroad were therefore exhausted by the original mortgage of 1870, and that all subsequent mortgages were void. This same contention appeared in the Biddle and Ward letters of April 6 and April 15, 1896 (Def. Exs. 4 and 6, App. 295, 297, 408, 415). It had in fact been rejected as early as 1883 by the United States Circuit Court for the Southern District of New York (*DuPont* v. *Northern Pac. R. Co.*, 18 Fed. 467).

Page 42 of the present petition asserts that the failure to obtain express Congressional approval of the 1896 Reorganization Plan supports petitioners' argument that the Railway is without capacity to take or hold the Railroad's property. The same argument appeared in a printed circular distributed in 1896, as part of the original attempt to organize a protective committee (Def. Ex. 2, App. 292, 405).

These initial protests were rejected and the Reorganization Plan was executed, the present respondent Northern Pacific Rail*way* coming into open and notorious possession of all properties of the old Rail*road* Company, including its rail system, franchises and land grant. A public statement to that effect was given to the New York Stock Exchange on December 1, 1896, and is quoted in the Complaint (App. 25).

Soon after the 1896 foreclosure there began a long series of complaints. The first of these were addressed to the Secretary of the Interior, who was in charge of issuing patents under the original land grant made by Congress in 1864. He referred the matter to the Attorney General, who on February 8, 1897, handed down a formal opinion in which, after reviewing the facts, he concluded:

> "You [Secretary of Interior] should act upon applications for patents by the new company upon exactly the same considerations which would govern you in case there had been no foreclosure and the applications were made by the old company" (21 O. A. G. at 491).

In reaching this conclusion, the Attorney General considered and rejected the argument that the unsuccessful attempt to obtain Congressional sanction of the foreclosure destroyed the validity of the reorganization. He ruled that Congress, by its Joint Resolutions of 1870, had given its consent to the transfer of the Railroad's properties and franchises upon any foreclosure of its mortgages. Whether President Cleveland's Attorney General was right or wrong, his opinion establishes at least the antiquity of the arguments advanced in the present petition.

The dissenting shareholders next turned their attention to the annual meetings of shareholders of the Railroad, appearing and objecting at each meeting from 1898 to 1905.* Their protests were in each instance defeated by the respondent Rail*way*, which held more than 95% of the Rail*road* stock pursuant to the 1896 reorganization.

Thus, at the 1899 shareholders' meeting, counsel for the Committee offered a resolution charging that the sales and proceedings by which the Railway had become possessed of the Railroad's property were "irregular, fraudulent and void" (App. 435). At the 1900 meeting a resolution was offered reciting that the property of the Railroad had been "irregularly and fraudulently" acquired by the Railway, and demanding the institution of legal proceedings against the Railway and all other persons responsible (App. 440).

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* *1898*—Def. Ex. 8, App. 298, 417-23; *1899*—Def. Ex. 10, App. 304, 435-6; *1900*—Def. Ex. 24, App. 306, 440-1; *1901*—Def. Ex. 25, App. 308, 441; *1902*—Def. Ex. 26, App. 308, 441; *1903*—Def. Ex. 66, App. 347, 513; *1904*—Def. Ex. 67, App. 348, 517; *1905*—Def. Ex. 35, App. 326, 474.

Whether the defeat of these and other similar resolutions was right or wrong, the fact of that defeat establishes the antiquity of the present claims, and should have served at the time as a warning to petitioners that if they desired redress they should proceed promptly in the courts.

In fact, a representative suit in equity, based on the same claims as the present complaint, was begun in the Southern District of New York in November 1900. The plaintiff was Joseph Hoover, who had been a member of the opposition slate of directors nominated on behalf of the Committee in 1898 (App. 420). His complaint stated that he was suing "on behalf of himself and such other stockholders of the Northern Pacific Railroad Company as may intervene" (App. 423). The defendants were the Railroad, the Railway, the directors of both, members of J. P. Morgan & Company and others. Plaintiff Hoover was represented by Mr. Johnson and Mr. McCullen (App. 434), who were also counsel for the Committee. While the Committee was not formally a party to the suit, it was looked to for guidance (App. 170-1; Def. Ex. 37, App. 327, 476) and was generally "familiar with the progress of the Hoover suit" and "knew of [its] pendency" (App. 144, 300).

Hoover's lengthy bill of complaint (App. 423-34) recited generally the circumstances of the 1896 reorganization. It alleged that the reorganization managers and the Railway, by acquiring control of the majority of the Rail*road's* stock, had entered "into the domination" of all its affairs (App. 429). The relief asked was a full and complete discovery, a declaration of trust and an accounting (App. 433).

The answer of the *Hoover* defendants was filed on February 1, 1901. Depositions of some of the individual defendants were taken during 1903. As the docket entries in the *Hoover* case show (Def. Ex. 70, App. 359, 520), nothing else happened between July 24, 1903, when the last

deposition was filed, and November 1, 1937, when a motion was made to substitute Hoover's executor as party plaintiff.

Even while the *Hoover* case remained active, McCullen found time to pursue other "remedies". At the 1902 annual meeting he requested the management to "assist fully in every way" in a forthcoming Congressional investigation (Def. Ex. 26, App. 308, 446). His proposed resolution asserted as grounds for the investigation several points now asserted half a century later in this litigation, including the claim that the Rail*way* Company "had been consolidated with and merged in the Rail*road* Company" and that the issue of mortgage validity "was left undetermined and in dispute, such purchase being had and made by agreement". We thus find as early as 1902 the same alleged "lack of independence" of the Railway which serves as a basis for the "fraud upon the court" argument advanced at page 22 of the present petition. Petitioners indeed admit that the facts upon which they base that claim of "fraud upon the court" have been "open and known or discoverable" throughout the period under discussion (Petition p. 22, n. 1).

Acting under the prayer for discovery in the *Hoover* complaint, McCullen and his co-counsel Mr. Davenport turned in 1903 to an investigation of the books and records of the Railroad and Railway Companies, and secured a substantial amount of additional material (Def. Exs. 68, 108, 109, App. 158-163, 389, 554-5).

They then apparently abandoned the *Hoover* case, and turned instead to appeals to the Executive Departments and to Congress. In 1904 McCullen began a correspondence with the Interior Department (Def. Ex. 28, App. 321, 448 *et seq.*) in which he sought to overturn the Attorney General's opinion of 1897 which had recognized the Railway as successor to the Railroad.

His efforts led to a hearing at which McCullen submitted briefs to the Department and a memorandum to the Attorney General. Excerpts from these papers appear in Def. Exs. 30-33 (App. 321-25, 458-72). The now familiar points relating to the invalidity of the mortgages (App. 461, 463-4, 471) and the nullity of the decrees (App. 464, 469) were again advanced. These hearings resulted in the Attorney General's formal advice to the Secretary of the Interior that "the decision of my predecessor was correct, and accordingly I have to advise you that, in my opinion, you should continue to be governed" by the earlier opinion (25 O. A. G. 401, April 12, 1905).

The District Court thus comments on the 1897 and 1905 opinions of the Attorneys General (Appendix A to Petition, p. 14a):

> "It would seem that long ago plaintiffs should have been cautioned by the unproductive results of their protests to the non-judicial branches of the government * * *. [citing 21 O. A. G. 486 and 25 O. A. G. 401.] Thus, twice executive officers with responsibility of guarding the public interest put plaintiffs on notice that no support would be forthcoming from that branch of the government."

Activities in Behalf of the Dissenting Shares: 1906-1950.

With a few significant exceptions, the events of the 45-year period which began in about 1906 and ended with the filing of the present complaint, parallel closely the activities in behalf of the dissenting shares before 1906, and need not be set forth at length.*

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* See Def. Ex. 34, App. 325-6, 473; Def. Exs. 39-41, App. 330, 477-87; Def. Exs. 44-51, App. 336-7, 488-96; Def. Exs. 55-62, App. 341-3, 497-509; Def. Exs. 71-85, App. 364-73, 522-44; Def. Ex. 89A, App. 374, 544-5; Def. Exs. 91 and 93, App. 375, 546-8.

These activities included:

Repeated protests and demands for legislative and other action at meetings of the stockholders of the Railroad.

Unsuccessful sponsoring of Congressional resolutions, with attendant publicity.

Correspondence with the Interior Department, the Interstate Commerce Commission, the Director General of Railroads during World War I, members and prospective members of Congress, and officials of respondent Railway.

Especially significant was the activity—or lack of activity—on behalf of the minority shares with respect to two matters of litigation, the *Hoover* and *Land Grant* cases.

(a) *Correspondence in the Hoover Case.* Beginning with a letter of April 1, 1904 in which McCullen advanced the excuse that certain printing has been delayed "*because we have not yet conferred with the Committee we represent*" (quoted in Def. Ex. 123, App. 170-1, 402)—counsel for Hoover displayed an entire disregard for the diligent prosecution of the action, which led Mr. Stetson (counsel for the *Hoover* defendants) to warn them and the Committee in ever stronger terms that their continued delay would lead to their claim becoming barred by laches.

Specific warnings to this effect were given to members of the Committee at the 1906 and 1909 stockholders' meetings (Def. Exs. 37 and 106, App. 327, 388-9, 476). They were repeated in 1909 to Mr. Davenport, Hoover's co-counsel (App. 172).

On November 24, 1914 Mr. Stetson wrote Mr. McCullen as follows (Def. Ex. 43, App. 251, 332-3):

> "I understand that you have never had printed the minutes of the Hoover suit as undertaken by you many years ago, *despite my repeated notices to you*

> *and your clients that I should insist that your delay constituted such laches as would bar the further prosecution of that suit.** I have advised you also that I have found that Mr. Hoover, who is now dead, had consented to and participated in the reorganization of 1896."

On March 28, 1916, he wrote McCullen once more along the same lines (Def. Ex. 98, App. 381, 552). McCullen replied a few days later (Def. Ex. 100, App. 381, 553):

> "That a great wrong has been done them has always been believed in but *discovery of the breach of trust and of the perfidy of the fraud perpetrated against them was not had until now,* the facts having been most skillfully concealed from government officials, from the Court and from the public."

A further delay of thirty-four and one half years followed this *"discovery of the breach of trust"* before the Complaint in this action was filed.

(b) *The Land Grant Case.*** For many years controversies had arisen between the United States and the Railway regarding the nature and scope of the latter's land grant rights as successor to the old Rail*road.* On June 5, 1924 Congress established a joint committee to investigate the whole problem (43 Stat. 461). Five years of study and hearings resulted in a bill, enacted June 25, 1929, by which the Attorney General was authorized to institute an action to obtain "a final and complete determination of the respective rights * * * to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected * * *"

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* Italics ours throughout this brief.

** *United States* v. *Northern Pacific Railway Company, et al.,* 311 U. S. 317 (1940).

(46 Stat. 41, 43 U. S. C. Sections 921-929). The hearings preceding this enactment were followed continuously by an attorney for the Stockholders' Committee (Mr. Boylan); and the attention of Congress was "directed to the existence of these non-assenting shares" (App. 360).

The Attorney General in 1930 brought an action in the District Court for the Eastern District of Washington, challenging in certain particulars the foreclosures of 1875 and 1896 but nevertheless alleging that the Railway Company had succeeded to the rights granted under the original 1864 charter.* Mr. Lishman testified that Mr. Boylan, counsel for the Committee, "cooperated with the Government in the preparation of its case" (App. 346).

The case was referred to a Special Master, who made reports on May 31, 1933 and July 26, 1937. It was not until August 25, 1937 that the minority shareholders "filed without leave of court to intervene, a motion for an extension of time to file exceptions to the Special Master's report". After other procedural moves, they filed on January 20, 1938 a petition to intervene and took other steps designed to inject themselves into the Land Grant proceedings (102 F. 2d at 589, 591).

One of the stockholders joined in these efforts was George A. Landell, as executor of E. A. Landell, who in the same capacity now lends his name to the present action (App. 271). The Committee of minority stockholders, although—as in the *Hoover* case—not formally joined as a party, were fully aware of the attempted intervention (App. 357-8). Counsel for the intervenors included Mr. Boylan, the counsel for the Committee who had attended the Congressional hearings. The expenses and fees involved were

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* The course of the litigation is summarized by Judge Wilbur in *Schmidt* v. *United States*, 102 F. 2d 589, 591, 592 (9th Cir. 1939), and by Judge Schwellenbach in *United States* v. *Northern Pacific Railway*, 41 F. Supp. 273, 280-282 (E. D. Wash. 1941).

paid by Mr. Fearon, who had been the most active member of the Committee since 1898 (App. 345, 357).

The contentions advanced in the petition to intervene were only a rehash of the claims the minority stockholders had by that time been making for 40 years. Among other things, the foreclosure of 1875, the mortgages placed on the property after 1875, the reorganization and foreclosure of 1896, and the title of the Rail*way* to the Rail*road's* properties thereunder were all alleged to be invalid. (See 102 F. 2d 589 at 593). On March 9, 1938 the District Court denied the motion to intervene.

An appeal was taken to the Ninth Circuit Court of Appeals which, on March 17, 1939, affirmed the order denying intervention on alternative grounds, one of which was the seven years' delay by the stockholders before seeking intervention (102 F. 2d 589 at 595-6).

This Court's denial in October 1939 of certiorari to review this decision (308 U. S. 509) did not end the efforts of the minority shareholders to inject themselves into the *Land Grant* case. Before the argument and again before the reargument in 1940 of that case in this Court, the minority stockholders moved for leave to appear, which was denied on each occasion (309 U. S. 626; 311 U. S. 613).

Following the 1940 decision of this Court (311 U. S. 317), upon remand to the District Court the *Land Grant* case was settled, and all disputes between the Government and the Railway were terminated, with the approval of the Attorney General and the Court, after notice had been given to other interested executive departments and to both houses of Congress and no objections had been received. The terms of the settlement are set forth in the District Court's opinion, which also denies a final attempt by the minority shareholders to intervene (41 F. Supp. 273 at 280).

3. *Final dismissal of the Hoover case for laches.* Contemporaneously with the fruitless maneuvers described above, Mr. Boylan took steps to revive the *Hoover* case, which, by that time, had been inactive for almost 35 years. Plaintiff Hoover and all of the original counsel were dead, as well as all but six of the 39 individual defendants. Mr. Boylan, whose fees were again paid by Mr. Fearon (App. 302, 345), first obtained an *ex parte* order substituting Hoover's executor as plaintiff in 1937. Then, following dismissal of the case in 1938 for failure to answer a calendar call, he moved to restore it to the trial calendar. Judge Hulbert denied this motion, in an unreported opinion dated March 15, 1939 (Def. Ex. 123, App. 165-73, 402). He quoted at length from the letters discussed above (pp. 14-15) in which Mr. Stetson had repeatedly warned that continued delay would result in the action becoming barred by laches. Judge Hulbert noted that no sufficient excuse had been presented to explain the thirty-five year delay, and referred to the obvious physical changes that had occurred in the operation of the Railway since 1896. He denied the motion on the ground that (App. 173):

> " 'The mere institution of a suit does not of itself relieve a person from the charge of laches; and if he fail in its diligent prosecution, the consequences are the same as though no action had been begun.' (*Johnson* v. *Standard Milling Company*, 148 U. S. 360.)
>
> The Court does not feel there is any justification for the restoration of this cause to the calendar because of inexcusable laches in its prosecution, and the motion is accordingly denied. * * *"

No appeal was taken from Judge Hulbert's order.

Following the failure of his efforts in the *Land Grant* and *Hoover* cases, Boylan turned to attempts to obtain a

settlement (App. 369-372). When these failed he wrote the Railway on June 26, 1941 (Def. Ex. 77, App. 370, 534):

> "• • • we are now preparing the pleadings in a proper proceeding to be *promptly* instituted for the enforcement and protection of all the rights of our clients."

Nine and one-half more years—marked only by desultory correspondence (Def. Exs. 89-A, 93, App. 374-5, 544, 547) by Mr. Lishman, who replaced Boylan as counsel for the Committee in 1942—were to elapse after this threat of "prompt" action, before the present complaint was filed in December 1950.

All of the foregoing facts are undisputed. Nearly all of them are established either by documents from petitioners' own files or by the deposition of Mr. Lishman, one of the petitioners and also their counsel. We have set them forth at such length because they furnish the basis upon which both courts below acted in dismissing the complaint, and because they have been largely disregarded or passed over in the petition.

Argument.

What the facts set out above demonstrate—and what petitioners indeed now admit—is simply this: they or their predecessors have known all about their present claims for at least half a century but have deliberately refused to bring suit until every participant and witness had died and the position of the respondent had changed beyond recognition. This situation, entirely of petitioners' own making

and scarcely a reason why the docket of this or any other court should now be burdened with their claims, is entirely unique. To our knowledge there is no other reported case involving laches in which the facts were so extreme or in which the decision seems less likely to serve as a precedent. The closest case on facts that we have found is *Young* v. *Southern Pacific Co.*, 34 F. 2d. 135 (2d Cir.), *cert. denied*, 280 U. S. 597 (1929) which involved an attempt by shareholders in the old Houston & Texas Central Railway Company, at the time of the suit an empty corporate "shell" much like the Northern Pacific Railroad, to litigate a reorganization which had taken place under court decree in 1888. Their suit, instituted in 1926, was dismissed on demurrer for laches.* But even the nearly 40-year delay by the plaintiffs in the *Young* case falls short by more than a decade of approaching the half century during which present petitioners have procrastinated in asserting their claims.

We submit that the dismissal of the complaint for laches by both courts below was clearly correct. No extensive analysis of cases is necessary to establish that an unreasonable and unexplained delay in bringing action, accompanied by death of witnesses and change in position of defendant, bars absolutely the assertion of a claim by those with full knowledge of the facts, *e. g.*, *Johnson* v. *West India Transit*

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* The theory of the complaint in the *Young* case is identical with that litigated in *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 (1919) in which other and more diligent stockholders of the old Houston & Texas Central Railway Company were successful, after protracted litigation in several different courts, in gaining a favorable decision in this Court. Petitioners' reliance on the *Bogert* case (Petition 11, 12, 27, 28) is misplaced. In that case, unlike the present one, the plaintiffs had been given no opportunity to participate on equal terms and had been actively and continuously engaged in litigation from the outset to vindicate their rights. The total period elapsing between the accrual of their cause of action and the entry of final judgment in their favor was less than half the time that has elapsed here. Even so, the lower court alluded to the "long and unusual delay" (244 Fed. 64) and indicated that the statute of limitations would have been a bar if defendant had not waived it (244 Fed. 65-6).

Co., 156 U. S. 618, 647-649 (1895). Laches is a perfectly effective defense whether it is alleged that transactions are "void", *e. g.*, *Abraham* v. *Ordway*, 158 U. S. 416, 418-421 (1895), or judgments and deeds are attacked on the grounds of fraud, *e. g.*, *Boone County* v. *Burlington & Missouri River Railroad*, 139 U. S. 684, 692-694 (1891). Mere repeated objections unaccompanied by positive action to assert a claim will not excuse delay. *E. g.*, *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 697, 700 (1898). It was well settled under the old Equity Rules that laches could properly be raised by motion in advance of trial, *e. g.*, *Hays* v. *Port of Seattle*, 251 U. S. 233, 239 (1920). This is also true under the Federal Rules of Civil Procedure. *Dixon* v. *American Telephone & Telegraph Co.*, 159 F. 2d 863 (2d Cir.), *cert. denied*, 233 U. S. 764 (1947) (laches properly raised on motion for summary judgment).

None of the above-cited cases is discussed in the petition, which advances, as the major ground for granting certiorari, alleged conflicts between the decisions below and a number of decisions in this Court and other courts in which laches was held not to be a bar. No such conflict exists; and none of the cases cited deals with a fact situation even remotely analogous to that presented here.

Petitioners argue initially that laches cannot bar an action on their so-called "statutory contract", citing *Oregon & California Railroad* v. *United States*, 238 U. S. 393 (1915); 243 U. S. 549 (1917), (Petition 11, 14-19). The short and complete answer is that in that case the United States was plaintiff and, of course, laches is not imputable to the sovereign.*

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* In *Southern Oregon Co.* v. *United States*, 241 Fed. 16 (9th Cir. 1917), *app. dismissed*, 249 U. S. 589 (1919), cited in support of the same proposition (Petition 11, 15), the United States was also plaintiff. *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922), cited in the same connection on pages 11, 16 and 19 of the petition, holds merely that a delay of 7 years by Indian "wards of the nation" would not bar an action to enforce rights arising from a statute passed for their specific benefit.

Petitioners' second argument is that they are entitled to litigate their claims after a 50-year delay because of alleged "fraud on the court" which entered the decrees of foreclosure in 1896—a "fraud" which by petitioners' own admission has been "open and known or discoverable" ever since. *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (3rd Cir.), *cert. denied*, 296 U. S. 626 (1948), mainly relied on in support of this theory, decided only that in a case involving the integrity of the courts a delay possibly fatal to a private litigant in ordinary circumstances would not bar the correction of a judgment tinged with serious fraud. A consideration of the nature of the fraud there involved—the bribery of a judge of a Court of Appeals—and of the relatively short delay involved makes it clear that there is no inconsistency with the decisions below.*

Assuming *arguendo* that recovery for past wrongs is barred by laches, petitioners next turn their attention at pp. 36-41 to their "alternative theory" of relief, which is said to be for "violation of their existing and continuing present and future rights." They assert under this theory that the decisions below are in conflict with several decisions cited erroneously as holding that delay can never bar injunctive relief for continuing violation of trade-mark and patent rights, although an action to recover damages for past violations may be foreclosed. The District Court is criticized for failing "to meet these separate issues squarely" (Petition 36, 53). This seems an unfair criticism

* In this connection petitioners also cite *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944). This case, dealing with active fraud before the Patent Office and the courts established by undisputed affidavits and uncovered at most nine years before action was brought, is also based on such different facts as to raise no possible question of conflict. In *Stoddard* v. *Chambers*, 2 Howard 284, 318 (1844) and *Johnson* v. *Waters*, 118 U. S. 640, 667 (1884), (Petition 11, 22), the question of laches does not appear to have been raised or discussed at all.

of the thorough opinion of the District Court since petitioners did not press this point to any appreciable extent below. Moreover, the cases cited by petitioners do not support their contentions. While *Menendez* v. *Holt*, 128 U. S. 514 (1888) (Petition 47-48) does hold that the right to an injunction against future infringement of a trademark was not lost *on the facts presented in that case* though an action for damages based on past infringement had become barred, the opinion points out that an injunction may be barred by delay if it has been "continued so long and under such circumstances as to defeat the right itself" 128 U. S. at 523. Even less persuasive is *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 419 (1916) which holds, directly contrary to the incorrect statement on page 48 of the petition, that 40 years of non-use of a trademark will bar an injunction for infringement as effectively as an action for past damages. The other cases cited in pages 44-50 of the petition add nothing of substance to these arguments of "continuing wrong".*

Finally, petitioners contend that they should have been afforded a full trial and that summary judgment was improperly granted by the District Court, because of the "important public issues involved" (Petition 50-54). Signi-

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* On pages 44 to 47 petitioners cite these three railroad cases: *Pennsylvania Railroad* v. *St. Louis, etc. Railroad*, 118 U. S. 290 (1886); *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24 (1891); *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 234 (1922). In each of these an allegedly "void" lease was considered, rather than a completed conveyance, and in none of them is laches raised or discussed. *Schaffer* v. *Rector Well Equipment Co.*, 155 F. 2d 344 (5th Cir. 1946) (Petition 48) is not in conflict with the decisions below since there plaintiff had delayed for only 9 years and there was no showing of the death of witnesses, loss of evidence or a significant change in position of defendant. It is clear that in patent cases an injunction against future infringement as well as an action for past damages will be barred by unreasonable delay comparable to the conduct of petitioners during the past five decades. *E.g.*, *Brennan* v. *Hawley Products Co.*, 182 F. 2d 945 (7th Cir.), *cert. denied*, 340 U. S. 865 (1950).

ficantly, they do not contend that there is any dispute as to the material facts upon which their complaint was dismissed for laches. There are two answers to this final point. First, the propriety of the summary judgment procedure was not questioned in either court below. On the contrary, each main brief of petitioners heretofore submitted has closed with a prayer that summary judgment be entered in *their* favor on the merits. Second, and despite the desultory arguments which plaintiffs and their predecessors have been advancing since 1896, no public interests are involved. The same "public interest" claims which they advance in their present petition were rejected by President Cleveland's Attorney General in 1897, by President Theodore Roosevelt's Attorney General in 1905, by Congress in 1908 (App. 477-87) and by the Courts which denied the attempted interventions in the *Land Grant* case in the period 1938-40.* The interest, if any, of the public in the 1896 reorganization was raised and litigated by the Government in the *Land Grant* case, and any such questions were finally settled upon the remand of that case to the District Court (*supra*, p. 17).

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* *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-257 (1948), cited by petitioners on the summary judgment point, involved not only issues of national importance—an interpretation of the Fair Labor Standards Act involving the claims of many thousands of defense plant employees—but also disputed issues of fact going to the merits of the case. Other cases cited on this point are equally inapplicable. *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U. S. 426, 434 (1947) was concerned solely with whether the controversy in issue was "justiciable". *Arenas* v. *United States*, 322 U. S. 419, 434 (1944) was remanded to the District Court for necessary findings of fact. *Palmer* v. *Chamberlin*, 191 F. 2d 532 (5th Cir. 1951) holds merely that on its particular facts summary judgment was properly granted. All of these cases are consistent with the use of summary judgment on the motion to dismiss for laches in this case.

Conclusion.

The decisions of both courts below were obviously correct and in accordance with long-settled principles. The petition should be denied.

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Respectfully submitted,

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